

Aquifer Exemption Language

May 5, 2016

Bill Language:

The Administrator of the Environmental Protection Agency shall work within the existing criteria and procedures for aquifer exemptions in the Underground Injection Control regulatory framework, in a collaborative manner with the States and regulated industries, to promptly review and make decisions on all aquifer exemption applications using the criteria for exempted aquifers set forth in 40 CFR 146.4 (as in effect on April 1, 2016). Consistent with EPA's Guidance for Review and Approval of State UIC Programs and Revisions to Approved State Programs, GWPB Guidance #34, the Administrator shall not use substantial program revisions for purposes of reviewing and making decisions on aquifer exemption applications involving underground injection authorized by permit, provided the injection is occurring into aquifers that meet the criteria for an exemption set forth in 40 CFR 146.4 and the recommendations of key State resource agencies are taken in account.

Report Language:

Exempt Aquifers. Existing criteria and procedures for aquifer exemptions under EPA Underground Injection Control (UIC) regulations for all classes of injection wells are sufficiently flexible to address new and changed circumstances, including the development of significant new information regarding what can or cannot reasonably be expected to serve as a source of drinking water. The Committee believes amendment to these criteria is not necessary or warranted. EPA is directed to work within the existing UIC regulatory framework, in a collaborative manner with the States, and the energy producing industry, and all other stakeholders that rely on UIC operations, to promptly review and process all aquifer exemption applications submitted to the Agency, including applications for Class II injection by permit, to ensure robust oil and natural gas production in the States as well as robust economic development. Consistent with EPA's Guidance for Review and Approval of State UIC Programs and Revisions to Approved State Programs, GWPB Guidance #34, substantial program revisions are not to be used for purposes of processing aquifer exemption applications involving Class II injection authorized by permit, provided the injection is occurring into aquifers that meet the criteria for an exemption set forth in 40 CFR 146.4 (as in effect on April 1, 2016), and the recommendations of key State resource agencies are taken in account.

Programmatic/Environmental Effects

- These provisions would cause results inconsistent with the intent of the SDWA by preventing EPA from being able to protect underground sources of drinking water in some cases.
- It is not clear what is referred to by the phrase “work within the existing . . . procedures” particularly since some of the recommended procedures have been revised and EPA is currently in the process of developing further procedural recommendations.
- The provision that EPA should “make decisions on all aquifer exemption applications using the criteria for exempted aquifers set for in 40 CFR 146.4 (as in effect on April 1, 2016),” would preclude EPA from revising its regulatory criteria for aquifer exemptions. States, industry, and environmental groups have all asked EPA to consider revisions to the aquifer exemption regulations to provide clarity and better protect underground sources of drinking water.

- The language would require EPA to work with the states and regulated industries, but not necessarily other affected stakeholders such as nearby users of the water source, landowners, local governments and groundwater conservation districts.
 - EPA works with a full range of stakeholders.
 - The language could slow down the approval process for some aquifer exemptions.
- The requirement to “promptly review” and “make decisions” creates the potential for states, regulated industries, or other interested persons to bring deadline suits against EPA for not acting quickly enough on aquifer exemptions.
 - This would undermine EPA’s recent efforts to add additional rigor and more substantial documentation to the records of our decisions, as the Agency continuously strives to improve program implementation.
 - If EPA were under a deadline, it could potentially lead to more denials and undermine our collaborative efforts with states on sufficiency of the record (often supporting approvals). Often, additional information is required for a decision, which is added after the initial submittal to EPA and thus extends the time for approval. If forced to make a decision under a deadline, it may cut short this collaborative process and compel EPA to issue denials due to insufficient information.
- The bill language would preclude EPA from treating any “aquifer exemption applications involving underground injection authorized by permit” as ‘substantial program revisions’ even if they are determined by EPA to represent a substantial revision to the approved program, pursuant to 40 CFR part 145.32(b)(2) and as recommended in EPA guidance.
- This bill language is in direct conflict with EPA’s regulatory requirement in 40 CFR 144.7(d) and 145.32(b)(2) that Class VI aquifer exemptions be treated as substantial program revisions.

Background

- Substantial program revisions require EPA to provide notice and opportunity for a public hearing whereas EPA is not required to do so for non-substantial program revisions.
- Substantial program revisions may only be approved by a rule signed by the EPA Administrator, while non-substantial revisions may be approved by a letter signed by the Regional Administrator.
- Historically, EPA has only rarely treated aquifer exemptions as substantial program revisions.
- EPA’s recently promulgated regulations for Class VI UIC wells for geologic sequestration of carbon dioxide require expansions of Class II aquifer exemptions for Class VI wells to be treated as substantial program revisions (40 CFR 144.7(d) and 145.32(b)(2)).